No. 75-1535

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ALLAN ROSE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
MICHAEL J. KEANE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ALLAN ROSE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-3a) and its order denying rehearing (App. C, *infra*, pp. 7a-8a) are not reported. The order of the district court (App. D, *infra*, p. 9a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 5a) was entered on November 6, 1975. The government's timely petition for rehearing and suggestion for rehearing *en banc* were denied on February 24, 1976 (App. C, *infra*, pp. 7a-8a). On March 16, 1976, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including April 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a criminal case, the United States may appeal from a district court order granting a motion to suppress evidence, if the order is entered after the court—sitting as the trier of fact in a bench trial—has found the defendant guilty.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

18 U.S.C. 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [*sic*] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. On January 27, 1973, Border Patrol agents observing traffic on roving patrol near Deming, New Mexico, approximately 30 air miles from the Mexican border, pursued and stopped a Chevrolet van driven by respondent (Tr. 5-9).[1] The agents informed respondent that they were making a routine immigration check and asked him to open the back of his van (Tr. 9-10). When respondent claimed that the door could not be opened, an agent entered the van through the driver's door to look in the back for aliens. He detected a strong odor of marihuana (Tr. 10). The agent observed a "lumpy" mattress lying in the back of the van and found marihuana hidden underneath it (*ibid.*). A later search of the van and of respondent produced a total of about 13 1/2 pounds of marihuana "bricks" and other marihuana paraphernalia (Tr. 20-22).

An indictment returned in the United States District Court for the District of New Mexico charged respondent with possessing marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Respondent filed a pre-trial motion to suppress the evidence seized from the van and his person on the ground that the searches violated the Fourth Amendment. Respondent waived his right to a jury trial.

---

[1] "Tr." refers to the transcript of respondent's bench trial on March 8, 1973.

The motion to suppress was heard during the trial on the merits on March 8, 1973. At the close of the evidence, the district court denied respondent's motion to suppress and, on the basis of the evidence introduced at trial, found him guilty of the offense charged (Tr. 23).[2] Sentencing, which was originally set for April 2, 1973 (Tr. 23), was later deferred, on respondent's motion, pending this Court's decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, decided June 21, 1973.

The Court held in *Almeida-Sanchez* that a warrantless roving patrol search of a vehicle for aliens, conducted without probable cause at a point removed from the border and its functional equivalent, was unreasonable under the Fourth Amendment. The Tenth Circuit subsequently ruled, in *United States* v. *King,* 485 F. 2d 353, and *United States* v. *Maddox,* 485 F. 2d 361, that *Almeida-Sanchez* should be applied retroactively. Thereafter, the district court in the present case reconsidered and granted respondent's earlier motion to suppress evidence in light of the decision in *Almeida-Sanchez* (App. D, *infra,* p. 9a). The order stated that the court would "take appropriate action consistent with this Order if this Order is not appealed by the United States of America or if this Order is affirmed on appeal" (*ibid.*).

2. The United States appealed pursuant to 18 U.S.C. 3731. After this Court ruled in *United States* v. *Peltier,* 422 U.S. 531, that *Almeida-Sanchez* should not be applied retroactively to roving patrol searches conducted prior to June 21, 1973, the government in the present case moved for summary reversal of the district court's suppression order.

---

[2]The district court also denied respondent's pre-trial motion to quash the indictment and his tender of a plea to a misdemeanor charge (Tr. 4, 23).

The court of appeals, without reaching the merits of the appeal and without the benefit of briefs or oral argument, dismissed the government's appeal for lack of jurisdiction. The court held, relying on this Court's decision in *United States* v. *Jenkins,* 420 U.S. 358, that "the government has no right of appeal in this case," because "the defendant has been placed once in jeopardy and any further proceedings would necessarily involve the 'resolution of factual matters going to the elements of the offense charged'" (App. A, *infra,* p. 3a). "Under these circumstances," the court stated, "to subject the appellee to further proceedings would be to do substantial violence to the double jeopardy clause" (*ibid.*).

The court thereafter denied the government's petition for rehearing and suggestion for rehearing *en banc* (App. C, *infra,* pp. 7a-8a). The order denying rehearing stated: "In our view, the Supreme Court's decision in *United States* v. *Jenkins,* 420 U.S. 358, (1975) controls in this case and not *United States* v. *Wilson,* 420 U.S. 322 (1975) as suggested by the government" (*id.* at 7a).

REASONS FOR GRANTING THE WRIT

The legal issue and operative facts in this case are in all material respects identical to those in *United States* v. *Morrison,* in which we have also filed a petition for a writ of certiorari.[3] The decision in the present case is one of several in which the Tenth Circuit has misapprehended and unaccountably departed from the principles established only last Term in *United States* v. *Wilson,* 420 U.S. 322, and *United States* v. *Jenkins,* 420 U.S. 358.

For the reasons stated in our petition in *Morrison,* review by this Court is warranted in order to correct the court of

---

[3]We have sent respondent's counsel a copy of our petition in *Morrison.*

appeals' misapprehension and to avert the erosion of *Wilson* and *Jenkins*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MICHAEL J. KEANE,
Attorneys.

APRIL 1976.

DOJ-1976-04

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,	)	
vs.	)	No. 74-1769
RALPH ALLAN ROSE, Defendant-Appellee.	)	

Filed: November 6, 1975

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. NO. 25014-CR)

Before Honorable John C. Pickett, United States Senior Circuit Judge, and Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

PER CURIAM

Appellee Rose was found guilty of a violation of 21 U.S.C. 841(a)(1) following a trial to the court. However, a formal judgment of conviction was never entered. Instead, the district court reconsidered its earlier denial of defendant's motion to suppress certain evidence and, in the wake of the hearing required by our mandate in United States v. King, 485 F.2d 353 (10th Cir. 1973), granted the motion to suppress. The government now appeals that order under the provisions of 18 U.S.C. 3731. The validity of the searches by which the contraband was discovered was of critical importance in both *King* and this case. The facts of these cases were substantially similar and the resolution, adverse to the government, of the search issue on remand in *King* was apparently deemed to be applicable in this case.

The government has moved to summarily reverse the district court's suppression order. However, before reaching the merits of any issues related to that motion, we are obligated to first consider the threshold question of this court's jurisdiction. As a general rule, the United States has no right of appeal in criminal cases, absent express statutory sanction. United States v. Hines, 419 F.2d 173 (10th Cir. 1969). Under §3731, the government may appeal from an order of a district court suppressing or excluding evidence, provided that such order was " . . . not made after a defendant has been put in jeopardy or before the verdict or finding on the indictment or information . . .". Simply stated, §3731 clearly and expressly precludes a government appeal "where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Unquestionably, the defendant has been placed once in jeopardy and any further proceedings would necessarily involve the "resolution of factual matters going to the elements of the offense charged, . . . ". *See,* United States v. Jenkins, U.S. , 95 S.Ct. 1006 (1975). Under these circumstances, to subject the appellee to further proceedings would be to do substantial violence to the double jeopardy clause. We must therefore conclude that the government has no right of appeal in this case and that purported appeal must be dismissed for lack of jurisdiction. In view of the disposition of this case, the merits of the government's motion to summarily reverse need not be reached.

Appeal dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM - NOVEMBER 6, 1975

Before the Honorable John C. Pickett, Senior Judge, The Honorable Oliver Seth and The Honorable Robert H. McWilliams, Circuit Judges

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellant,	)	
vs.	)	No. 74-1769
RALPH ALLAN ROSE,	)	
Defendant-Appellee.	)	D.C. No. 25014-CR

Upon consideration of the record on appeal and the files of this court, it is ordered that the appeal is dismissed for lack of jurisdiction, pursuant to Rule 8 on the Court's own motion.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANUARY TERM - FEBRUARY 24, 1976

Before the Honorable David T. Lewis, Chief Judge, The Honorable John C. Pickett, Senior Circuit Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellant,	)	
vs.	)	No. 74-1769
RALPH ALLAN ROSE,	)	
Defendant-Appellee.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing *en banc* in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the circuit judges, Pickett, Seth, and McWilliams to whom the appeal was submitted. In our view, the Supreme Court's decision in United States v. Jenkins, 420 U.S. 358, (1975) controls in this case and not United States v. Wilson, 420 U.S. 322 (1975) as suggested by the government.

The petition for rehearing having been denied by the panel to whom the appeal was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CRIMINAL No. 25,014
RALPH ALLAN ROSE, Defendant,	)	

ORDER

The Court having reconsidered defendant's Motion to Suppress in light of the Supreme Court decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), it is hereby

ORDERED that the marihuana which is the subject matter of the charge herein shall be and is hereby suppressed.

The Court will take appropriate action consistent with this Order if this Order is not appealed by the United States of America or if this Order is affirmed on appeal. Defendant excepts to foregoing.

/s/ H. Vearle Payne

UNITED STATES DISTRICT JUDGE

Filed: October 15, 1974.